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No. 80-1688

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LAMARR BADONI, et al.,

Petitioners,

v.

ROBERT BROADBENT, Commissioner, Water and Power Resources Service, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

In their response to the Petition for Writ of Certiorari herein, both the federal respondents and the intervenor respondents appear to have purposefully disregarded the principal thrust of petitioners' arguments, preferring instead to mischaracterize, distort and belittle the serious Free Exercise claims that prompted this liti-

gation. In particular, neither responsive brief makes any effort to answer any of the arguments set forth under Point I of the Petition (Pet. 18-27), which discussed the striking hostility towards religious beliefs revealed in the Court of Appeals' opinion, nor, indeed, do respondents attempt to defend that opinion to any substantial degree.[1]

1/ At one point in its brief, the government suggests that while judicial relief for petitioners' claims is precluded, the Park Service could accommodate petitioners' religious needs administratively, by issuing permits for religious ceremonies and by possible changes in Park Service regulations. (Fed. Br. 9) The sham "permit" issue is addressed infra, Pt. III; of note here is that the Court of Appeals specifically held below that issuance of regulations to accommodate petitioners' religion "would seem a clear violation of the Establishment Clause" (Pet. App. A54). The Court of Appeals' opinion nowhere suggests, and appears to rule out, the possibility that the government could voluntarily accommodate petitioners in ways a court is forbidden from mandating. (See Pet. 36-37, n. 19). The government's assertion that some administrative accommodation is not only appropriate but available, thus, while on its face totally inadequate to meet petitioners' complaints, flies in the face of the Court of Appeals' holding.

As will be shown herein, the main contentions in the responsive briefs amount to little more than an effort to divert the Court's attention from the issues in this case. Petitioners' arguments stand essentially unrebutted.

II. THE GOVERNMENT'S BRIEF OVERLOOKS THE ESSENTIAL FACTUAL PREMISES UNDERLYING THIS LITIGATION

The fundamental flaw that infects the government's entire response is revealed in the government's assertion (Fed. Br. 8) that

> [t]o elevate petitioners' religious interest in shielding the Monument from tourists over the public interest in access would convert the Monument into an area maintained by the government primarily for religious purposes, which would raise serious Establishment Clause problems.

This echoes the concern of the Court of Appeals below, that were petitioners granted any relief, "the monument would become a government-managed religious

shrine" (Pet. App. A57).[2] But as petitioners noted at some length (Pet. 5-7, 29-31), and as the record shows (see, e.g., Pet. App. A45-A46), Rainbow Bridge and its environs constituted an important religious shrine long before it was declared to be a national monument, and for a full century before the creation of Lake Powell made it a popular and highly touted tourist attraction. The question here, thus, is not whether the Monument may be "converted" into a religious shrine; rather, it is whether the federal government may unilaterally take over an established reli-

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2/ As pointed out in the Petition, Pet. 32-35, esp. nn. 17-18, and the brief of amici curiae American Baptist Churches, et al., at 13-15, esp. nn. 4-7, the Park Service and other federal agencies presently manage sites and buildings utilized for religious worship by Native Americans and others, without apparent First Amendment problems.

gious shrine,[3] then manage that shrine

3/ The government and the intervenors both try to make something of the fact that when Rainbow Bridge was proclaimed to be a national monument in 1910, the area was not part of the Navajo Reservation. (Fed. Br. 8, n. 8; Int. Br. 7-8.) While the respondents' point is not material, it should be noted that the Indian Claims Commission found that by 1868, the Navajo people had established aboriginal Indian title to the northern and western slopes of Navajo Mountain, Navajo Tribe of Indians v. United States, 23 Ind.Cl.Comm. 244 (1970), and Navajo occupancy of the region obviously formed the basis for the Executive Order of May 17, 1884, that added the so-called "Paiute Strip" to the Navajo Reservation. The area encompassed by that Order included Rainbow Bridge and its vicinity. As the Intervenors concede (Int. Br., 7), the subsequent restoration of that area to the public domain in 1892 was due to a belief that it had mineral potential, not because of any lack of Navajo interest in the area. The Luckert manuscript (Pet., Ex. A, 9, 27) points out that Navajo settlement of the canyons around Navajo Mountain was spurred by the flight of many Navajos from Kit Carson and the United States Cavalry in the early 1860's. Those first settlers quickly identified the important deities in their new homelands, among them the powerful spirit beings who occupied Bridge Canyon. In short, Navajo religious interest in and use of the Rainbow Bridge area has existed without interruption for more than a century. In contrast, intensive tourist use of, and, thus, Park Service interest in, Rainbow Bridge arose only in the last fifteen years, when the waters of Lake

solely for the benefit of tourists, such that the pre-existing religious practices are prevented from continuing.

The government, the intervenors, and even the courts below, have all studiously avoided that unique aspect of this case, and have assumed that the starting point for analysis of the issues herein must be, as the government says (Fed. Br. 8), that Rainbow Bridge "is government property declared to be an object 'of historic or scientific interest . . .,'" and that if petitioners wish to hold religious services there they may apply to the Park Service for a "public assembly permit." But as

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3/(cont.) Powell reached a level that made access by power boat practical. Government responses to interrogatories submitted by plaintiffs in the District Court showed that before 1964, tourist visitation to Rainbow Bridge never exceeded 3000 annually, but had climbed to 65,171 in 1975 (the last year for which complete figures were provided). Indeed, on a single day in May, 1975, according to those responses, 1432 tourists visited the Bridge, more than the total for any year prior to 1961.

suggested in the Petition (Pet. 30) the government would hardly contend that it could unilaterally expropriate the Mormon Temple and its environs in Salt Lake City, and manage it for tourists as "an object of historic interest," to the exclusion of continued religious worship there, without raising substantial Free Exercise problems, and the idea that the congregation's objections could then be resolved by their applying for a public assembly permit for religious worship "outside of normal visiting hours" (Fed. Br. 6, n. 6) would be viewed by all as patently ludicrous, and constitutionally unthinkable.

Yet the government's entire argument is underlain by the assumption that federal assertion of dominion over Rainbow Bridge is constitutionally immune, and that petitioners' Free Exercise rights must not impair what the government seems to regard as the government's "fundamental" interest

in allowing tourists to tramp all over Rainbow Bridge. Petitioners submit that to sustain such a position would leave every place of religious worship in the nation exposed to a limitless power of expropriation by government, that would make a mockery of the Free Exercise Clause. Cf. Pillar of Fire Church v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973)(religious belief may invest a building with religious significance such that condemnation for public purpose would offend the Free Exercise Clause); Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 239 N.E. 2d 891 (1968)(Free Exercise Clause mandates limitations on police power restrictions, such as zoning ordinances, as applied to religious structures).

III. THE "PERMIT" ISSUE RAISED BY THE GOVERNMENT IS WHOLLY SPECIOUS.

The government argues, for the first time in the seven years this case has been

in litigation, that petitioners' claim that federal management of the Monument interferes with their religious practices and beliefs "is not ripe for review by this Court," because petitioners have never applied for a public assembly permit under which they might hold their ceremonies (Fed. Br. 6, n. 6). This assertion of unripeness was prompted by a passage in the Court of Appeals' opinion (Pet. App. A58), in which that Court suggested that petitioners' problems could be resolved by the issuance of a permit "to permit access after normal visiting hours when privacy might be assured."[4] As noted in the Petition (Pet.

4/ It must be emphasized that this remark is mere speculation by the Court of Appeals, since there has never been any factual hearing on the question of how petitioners' Free Exercise rights could be protected in these circumstances. It could be shown at such a hearing, for example, that there is no such thing as "normal visiting hours" at Rainbow Bridge. The floating dock at the Monument affords private boats a place for overnight mooring, and radios, tape decks and loud parties blare long in-

17, n. 8), this facile suggestion hardly addresses the extent or severity of the infringements petitioners' religious practices have suffered, even as described by the Court of Appeals (Pet. App. A46), and on its face the permit regulation cited by that Court, 36 C.F.R. §2.21(a) would appear to be inapplicable to this situation, as it refers only to "[p]ublic meetings, assemblies, gatherings, demonstrations, parades and other public expressions of views" (emphasis added). An essential aspect of petitioners' complaint is that their ceremonies are private affairs, which are not and cannot be held in public places.

This Court, moreover, has traditionally looked askance at government permit require-

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4/(cont.) to the night throughout the boating season in Bridge Canyon (as at all the other highly prized mooring places along Lake Powell's generally inhospitable shoreline).

ments for the exercise of First Amendment rights, see, e.g., Village of Schaumburg v. Citizens For A Better Environment, ____U.S. ____, 100 S.Ct. 826 (1980); First National Bank of Boston v. Belotti, 435 U.S. 765 (1978); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940), particularly where such requirements appear to allow the permitting official broad discretionary power. The regulation cited above might appear to be facially unobjectionable, but earlier in this litigation the Park Service set out in great detail the terms under which petitioners might obtain the permits on which the government now places such weight in its brief. In an Order entered on October 26, 1975, the District Court reported on the progress of the settlement negotiations that had commenced soon after the complaint was filed and that had, by then, run their course. The issuance of permits

for Navajo religious ceremonies had been a subject of discussion in those negotiations, and the government's final, magnanimous offer on that subject was set forth in paragraph 5 of the District Court order:

> 5. The defendants agreed, upon ninety days written notice, to close the Monument to tourist traffic from the existing courtesy dock for up to two daylight hours and during the night to permit persons approved by the plaintiffs and the National Park Service to conduct religious ceremonies within the Monument so long as the ceremony would not conflict with activities of any other group having a prior valid permit or with heavy use periods.

(Emphasis added.) The requirement of ninety days written notice, alone, effectively precludes the extension of the permit privilege to Navajo medicinemen entirely, since these ceremonies are held only as requested, and are rarely scheduled even as much as two weeks in advance, and few medicinemen read or write English. The closure would not prevent intrusions

by curious tourists docked overnight at the courtesy dock, and there are no Park Service personnel stationed at the Monument to enforce privacy. The requirement that permittees be "approved" by plaintiffs and the Park Service opens up precisely the kind of discretion the cases have consistently condemned; and the proviso at the end potentially swallows up the entire offer. "Heavy use periods" could include the entire summer season, when rain-bringing ceremonies would most likely be needed.

Even were any kind of permit procedure constitutionally tolerable in this context (which petitioners deny; see discussion infra), the conditions proposed in the instant case are so obviously unsatisfactory as to render unnecessary any effort by petitioners to go through the motions of complying. The application of such terms to the exercise by petitioners of their traditional religious practices at

Rainbow Bridge would, indeed, aggravate, not alleviate, the violations of petitioners' Free Exercise rights already evident.

Finally, however, the very concept of requiring permits for petitioners' ceremonies assumes the legitimacy of the government's takeover of Rainbow Bridge and subsequent regulation of Navajo religious activity there. (See Pt. II, supra.) The facts of this case, particularly in light of the government's brief, squarely raise the question of whether the government may attempt to impose any regulation whatever on the religious activity of Navajos at Rainbow Bridge. Petitioners and their ancestors have uttered their prayers and chants to the deities in Bridge Canyon for generations, since long before any white man ever saw the area. Those age-old rituals, and the beliefs they embody, surely need not be sacrificed to the

government's interest in creating tourist attractions, if the Free Exercise Clause means anything in this context.

IV. THE DEPRECATION BY THE RESPONDENTS OF PETITIONERS' CLAIMS OF FREE EXERCISE VIOLATIONS, IS FULLY REBUTTED BY CASE LAW AND THE RECORD HEREIN

The government attempts to belittle the severe religious oppression it has caused petitioners, saying that since petitioners do not allege any direct government interference with their ceremonies or outright denial of access to the Monument, but complain primarily about effects of tourist activity, they have alleged no "'coercive effect'" on the practice of their religion. (Fed. Br. 7, quoting Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963).) The intervenors observe that petitioners do not allege "that they have been persecuted or prosecuted under any act of Congress because of their religious beliefs" (Int. Br. 13). Obviously,

direct governmental interference with religious ceremonies, denial of access to religious shrines, and persecution and prosecution for one's religious beliefs, would clearly offend the Free Exercise Clause. But the cases in this Court under that Clause have never required a showing of such gross oppression of religion before relief is warranted.

Just two months ago, in Thomas v. Review Board, ____U.S. ____, 49 U.S.L.W. 4341 (April 6, 1981), this Court held that for a state merely to put an individual to the choice of participation in a public welfare program or adherence to his religious beliefs, even where those beliefs may be somewhat personal and idiosyncratic, violates the Free Exercise Clause. In that case, Eddie Thomas did have a choice -- that is, he could continue to act in accordance with his beliefs, and merely forego unemployment benefits from the state.

Petitioners here have no such option. The oppression they have suffered is absolute. There is only one Bridge Canyon in their pantheon, only one Rainbow Bridge. Thomas surely precludes any debate as to whether a Free Exercise violation is revealed in this record, despite the representations of the government and the intervenors. Navajo gods and shrines of major religious significance have been destroyed by the waters of Lake Powell.[5] The government's

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5/ The government makes the astonishing assertion (Fed. Br. 6, n. 5) that '[p]etitioners appear to have abandoned in this Court their contention that maintenance of the present water level in Lake Powell violates their First Amendment rights." The creation of Lake Powell is the primary cause of all of the Free Exercise violations complained of here, and petitioners have asserted that quite vigorously in their Petition. (Pet. 3, 10, 11, 12, 14, n.7, 19, n.11) Both courts below, however, concluded that even if such a violation had been caused by the Lake (which those courts declined to decide), the federal interest in maintaining the Lake at its designed level is so compelling as to justify whatever inroads on petitioners' beliefs thus necessarily resulted. Petitioners acknowledge that the federal interest is appar-

highly successful campaign to make Rainbow Bridge a major tourist attraction (Pet. 9, n.2, supra)[6] has, predictably, resulted in Navajo religious ceremonies being interrupted, or prevented from being held, and Navajo medicinemen becoming discouraged

5/ (cont.) ently very lofty; but they do not concede that the analysis of even that issue by either court below was at all in keeping with the requirements of Free Exercise adjudication, particularly since neither court was willing to acknowledge the existence of a constitutional violation in the first place.

6/ The Government now concedes that Rainbow Marina is still in place, (Fed. Br. 9, n. 10), but claims that construction of a new marina nearby "has begun." Completion of that facility, however "will depend on availability of funds." Ibid. One cannot assume, thus, that the aggravation of the constitutional violations complained of herein attributable to the Marina (as shown by the record, Depo. of Temple Reynolds, 33) will necessarily be eliminated in the foreseeable future. And to be sure, the dock at the Monumenent remains, beckoning tour boats and hundreds of private powerboats daily. (See, Pet. 20, n. 13)

even from attempting to hold ceremonies at or near Rainbow Bridge.[7]

Petitioners here have suffered violations of their Free Exercise rights of a severity rarely seen in American courts. The government's statement that its actions have had no "coercive effect" on Navajo religion, in the face of even the limited record in this case, is utterly fatuous.[8]

7/ See Answers to Interrogatories 5(p) and 5(q) by petitioners Lamarr Badoni, Teddy Holiday, Jessie Yazzie Black, Navajo Mountain Chapter (Robert Tallsalt) and Inscription House Chapter (Buster Hosteen Nez). Petitioner Jimmy Goodman, in response to Interrogatory 5(s), reported hearing of an incident in which park rangers told a group of Navajos who had gone to the Bridge for an overnight ceremony that they could not stay there. Though hearsay, the report is entirely consistent with the government's repeated suggestion that petitioners must obtain permits to hold their ceremonies at the Monument. And it is indicative of the very kind of "direct interference" with Navajo religious observances by federal agents that the government contends is absent from the allegations in this case.

8/ Similarly, the government's remark that petitioners have alleged no violation of the American Indian Religious Freedom Act (AIRFA), Pub.L. 95-341, 92 Stat. 469 (1978)(Fed. Br. 9, n. 9), must be disre-

V. CONCLUSION

For the foregoing reasons, and those stated in the Petition herein, the Writ of Certiorari should be granted.

Respectfully submitted,

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8/ (cont.) garded. That Act directed federal agencies to exercise special care to insure that the Free Exercise rights of Native Americans are not impaired by federal actions. To the extent this case alleges that federal actions have infringed on the Free Exercise rights of petitioners, it necessarily implicates federal violations of AIRFA.